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In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AFL–CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, ET AL., AND PHELPS DODGE CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case. A petition to review the same judgment has been filed by Phelps Dodge Corporation, No. 72–220, this Term.

OPINIONS BELOW

The opinion of the court of appeals (App., pp. A6–A14[1]) is reported at 459 F. 2d 374. The decision and order of the Board (App., pp. A14–A66) are reported at 184 NLRB No. 106.

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[1] To avoid needless duplication, Appendix references are to the Appendix to the petition in No. 72–220, this Term.

JURISDICTION

The judgment of the court of appeals (App., pp. A4–A5) was entered on May 9, 1972, and an order modifying the opinion was entered on May 25, 1972 (App., pp. A66–A67). On July 31, 1972, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including September 6, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

In negotiations with a company that does not have company-wide collective bargaining, the unions insisted that final settlement of the contract covering the unit of the company's employees in which the bargaining was conducted be withheld, until agreement also was reached between the unions and the company in other units in which bargaining also was taking place. The avowed objective of the unions in the bargaining was to obtain similar contract terms for all units. The question presented is whether such conduct by the unions involved a demand for company-wide bargaining, contrary to the established units, and therefore constituted a refusal to bargain, in violation of Section 8(b)(3) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et. seq.*), are as follows:

> Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

* * * * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: * * *

* * * * *

Sec. 9(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The facts are basically undisputed. Phelps Dodge Corporation ("the Company" or "Phelps Dodge"), whose principal office is in New York City (A. 277,

8),[2] operates four separate facilities in the State of Arizona ("the Western Operations"), which mine, concentrate and smelt ores. The Company also has a number of wholly-owned subsidiary corporations which, among other things, operate a copper refinery in El Paso, Texas (A. 443, 154–155), and manufacture wire, telephone cable, and related products at plants in Fordyce, Arkansas, and in Yonkers, New York (A. 443–444; 129, 133–134).[3]

The Company's employees have for many years been represented in different bargaining units by the 14 international unions involved in this proceeding (A. 447; 19–20, 298). Prior to 1967, bargaining at the Western Operations was often conducted with combinations of the various unions representing the employees there (A. 447; 20–21). The Company, however, never combined bargaining for its Western Operations with bargaining for any facilities of its subsidiaries (A. 21–22).

In March 1967, the Nonferrous Industry Conference ("NIC"), composed of representatives of the unions in that industry, promulgated "1967 Nonferrous Bargaining Policy Goals" which included obtaining company-wide master agreements and common contract termination dates throughout the industry. The NIC also established joint negotiating committees for each major copper company. In April 1967,

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[2] "A." refers to the appendix to the briefs in the court below.

[3] Until August 22, 1967, Phelps Dodge Industries also owned the MacKenzie-Walton Company, which was engaged in the manufacture of copper and alloy tubes at Lincoln, Rhode Island (A. 444; 129–130).

the joint committee established to bargain with Phelps Dodge sent the Western Operations a number of proposals for modification of the then existing labor contracts (A. 450; 27–28, 341–345). These proposals, which expressly included the NIC bargaining goals, went beyond the Western Operations and contained demands to be applicable at the El Paso Refinery (A. 451; 342–345).

It is undisputed that, when the various company units refused to agree, the unions receded from their demand for a single master agreement covering all properties of the Company, and held separate negotiations with the established bargaining units. In the Western Operations negotiations, however, the unions demanded the right to have any provision negotiated in any agreement with other units of the Company incorporated into their agreement (the "most favored nation" clause) (A. 400, 453; 37–38), and a no-strike clause which would apply only when there was no lawful strike at any company unit (A. 452; 33–34, 399). The union negotiators at the other company units demanded settlements which were the same as the one to be negotiated for the Western Operations (A. 453; 158–159).[4] Thus, the unions sought to establish company-wide uniformity in the agreement terms.

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[4] For instance, the union representative in the El Paso negotiations said that the union position in El Paso was the same as in Arizona and that El Paso issues would not be resolved in El Paso (A. 453; 159).

The parties were unable to resolve their differences (A. 454; 47–53). On July 15, the Company's Western Operations were struck (A. 454; 51–52), as were its MacKenzie-Walton facility (A. 454; 137) and El Paso refinery (A. 454; 52).

In negotiations during the strike, the unions dropped their insistence on the "most favored nation" and limited no-strike clauses, but demanded a company-wide "economic package," common contract termination dates, and simultaneous settlement of the contracts of all company units.[5] After the President intervened, agreement was reached on March 8, 1968, on the terms of the Western Operations contract. The unions nevertheless refused to sign it until it had been submitted to the NIC (A. 461; 164), which took no action, but directed the negotiators to continue bargaining to obtain uniform company-wide contract expiration dates (A. 461–462; 127–128, 178, 433–434). Finally, when agreements had been concluded with all other company units, NIC approved the Western Operations contract on March 16 (A. 463; 191).

B. THE BOARD'S DECISION AND ORDER

The Board (with one Member dissenting) found "that one of the [unions'] primary objectives through-

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[5] A special panel, established by the Secretaries of Labor and Commerce to help resolve the strike, concluded that these were the unions' "basic ingredients which represent absolute preconditions for negotiations" (A. 460; 397–398). In testimony before this panel, a union representative affirmed that the unions were seeking company-wide bargaining (A. 459; 385-386).

out the course of bargaining at the [Company's] Arizona operations was to obtain agreement on terms and conditions of employment to be applicable generally on a companywide basis" (App., p. A15). The Board concluded that, "by insisting in furtherance of the aforesaid objective, as a condition of settlement of negotiations covering the [Company's] operations in its Western Division, on simultaneous and satisfactory settlement of contracts in other bargaining units and by striking in support of such demands," the unions sought to compel the Company to "engage in companywide bargaining, beyond the scope of established bargaining units," and thereby "violated Section 8(b)(3) of the Act" (App., pp. A17–A19).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals declined to enforce the Board's order. It read the Board's decision as being "based largely upon its belief that the unions began negotiations with the intention to secure company-wide master contracts and never abandoned that goal" (App., p. A11). The court concluded that the record did not support a finding that "the unions had never abandoned the objective of companywide contracts" (*ibid.*), since they had conducted separate negotiations at each of the company's units, without discussing the terms of employment at other units. Further, assuming without deciding (as the Board did) that the unions' demands for "most favored nation" and limited no-strike clauses, and for simultaneous settlement of all contracts were mandatory subjects of bargaining, the court held that the fact

that the unions insisted to impasse upon them "is not evidence of an attempt to merge the bargaining of separate units" (App., p. A13). "The fact that a demand may have extra-unit effects does not alter its status as a mandatory subject of bargaining" (*ibid.*).

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals undermines a cardinal principle on which the National Labor Relations Act is predicated, *i.e.*, that the established bargaining unit fixes the limits of the parties' mandatory bargaining obligation. The decision would permit labor organizations in major industries to resort to tactics like those utilized here to expand the scope of collective bargaining beyond established bargaining units and thereby unduly impede the negotiation and execution of collective agreements for those units, which, in turn, would be likely to foment further industrial strife. Review by this Court is thus warranted.

1. Although the employer and the union may voluntarily agree to merge separate bargaining units for purposes of contract negotiations,[*] such enlargement of the bargaining units is not a subject of mandatory bargaining under the Act. Cf. *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 164; *National Labor Relations Board* v. *Borg-Warner Corp.*, 356 U.S. 342. Therefore, neither party is free to insist, as a condition of reaching agreement in one

[*] As was done here with respect to the Western Operations (*supra*, p. 4).

unit, that the negotiations also include other units or that the terms negotiated in the first unit be extended to the other units.[7] See *Standard Oil Co.* v. *National Labor Relations Board*, 332 F. 2d 40, 45 (C.A. 6); *Doude* v. *Int'l Longshoremen's Ass'n*, 241 F. 2d 278 (C.A. 2); *National Labor Relations Board* v. *South Atlantic & Gulf Coast Longshoremen's Ass'n*, 443 F. 2d 218 (C.A. 5); *National Labor Relations Board* v. *Int'l Brotherhood of Electrical Workers*, 266 F. 2d 349 (C.A. 5), enforcing 119 NLRB 1972, 1795–1798. See also *United Mine Workers* v. *Pennington*, 381 U.S. 657, 666–667; *National Labor Relations Board* v. *George P. Pilling Co.*, 119 F. 2d 32, 38 (C.A. 3). Cf. *U.S. Pipe and Foundry Co.* v. *National Labor Relations Board*, 298 F. 2d 873, 877–878 (C.A. 5), certiorari denied, 370 U.S. 919. *Lynchburg Foundry Co.* v. *National Labor Relations Board* (C.A. 4), decided May 16, 1972, 80 LRRM 2415, affirming, 192 NLRB No. 110.

2. The basic issue in this case is whether the Board may properly determine that a union has sought to

[7] It is true "that a legitimate aim of any national labor organization is to obtain uniformity of labor standards," and that "a union may adopt a uniform wage policy and seek vigorously to implement it." *United Mine Workers* v. *Pennington*, 381 U.S. 657, 665, n. 2, 666. Thus, it would not violate the Act for a union to use a consummated contract in one unit as the pattern for contracts in other units. The Act is violated, however, where the union seeks to force the terms negotiated in one unit upon the other units, by withholding final settlement of a consummated contract in the first unit until the same basic terms have been extended to the other units. In the latter case, the bargain in the first unit is not merely a pattern, but it controls the bargaining in the other units just as effectively as if the units had been combined.

compel the employer to engage in bargaining beyond the scope of established bargaining units, in violation of Section 8(b)(3) of the Act, where, although it engages in separate negotiations for each unit, it refuses to execute an agreement in one unit until the same general terms are made available to the other units as well.

It is undisputed that this is what the unions did in this case. The court of appeals held that, without more, such actions do not constitute a violation of Section 8(b)(3) of the Act.

Although the court phrased its decision in terms of a lack of substantial evidence to support the Board's finding that the unions continued to seek a company-wide agreement, it in fact rejected the Board's legal conclusion that the undisputed facts showed a refusal to bargain by insisting that the terms negotiated in one unit be extended to the other units. The Board held that it was an unfair labor practice for a union to insist, as a condition of the settlement of negotiations in one bargaining unit, on simultaneous and satisfactory settlement of contracts in other bargaining units, in order to obtain company-wide uniformity on terms and conditions of employment. The court of appeals held that this, on the undisputed facts, was not an unfair labor practice, and that before an unfair labor practice could be made out the record would also have to show either bad faith bargaining by the union, or insistence to impasse on a non-mandatory demand. The evidence admittedly does not show the additional factors required by the court. In that sense only is the evidence not adequate to support the Board's decision.

The question meriting review by this Court is whether such factors are a necessary element of the unfair labor practice of insisting on bargaining beyond the scope of established bargaining units.

The disagreement between the Board and the court concerning whether the union goal of achieving company-wide master agreements was ever abandoned thus resolves itself into the question whether the translation of such goal into an effort to achieve company-wide uniformity by assuring the coincidence of the individual contracts negotiated for each unit constitutes an abandonment of the original goal. The court held that it does, given the assumption that none of the means by which this coincidence would be achieved constituted, in itself, a non-mandatory demand. The Board held that there was no abandonment, but merely the selection of an alternative means of achieving the same goal.

We submit that the Board correctly held that the unions could not insist to impasse on a course of conduct which in effect compelled the Company to bargain beyond established unit lines, a non-mandatory subject, even if the individual demands, in isolation, may constitute mandatory bargaining subjects. "Activities in isolation may be wholly innocent, lawful and 'protected' by the Act, but that ought not to bar the Board from finding, if the record justifies it, that the isolated parts 'are bound together as the parts of a single plan * * *. The plan may make the parts unlawful.'" *National Labor Relations Board* v. *Insurance Agents' Union*, 361 U.S. 477, 506 (separate opinion of

Frankfurter, J.). "[A] policy such as uniformity, innocent in and of itself, can in context become a vital part of an illegal overall pattern of conduct." *National Labor Relations Board* v. *General Electric Co.*, 418 F. 2d 736, 760, n. 15 (C.A. 2), certiorari denied, 397 U.S. 965.

3. The question whether unions, by the kind of tactics utilized here, may expand the scope of collective bargaining beyond established bargaining units is an important issue in the administration of the Act. Not only in the nonferrous industry, but in such other major industries as the electrical, the oil and chemical, and the telephone, there are many separate bargaining units and the companies have generally resisted the efforts of the unions representing those units to merge units and engage in company-wide bargaining.[8] The court below, in rejecting the Board's decision in this case, has shown the way for the unions to attempt to accomplish by indirection what they cannot achieve directly. Such an attempt in 1967–1968 resulted in an eight-month strike tying up the copper industry, which was terminated only after the intervention of the President. Similar disruptions of labor management relations are likely to be repeated[9] unless this

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[8] See *Standard Oil Co., supra; Shell Oil Co.*, 194 NLRB No. 166, pending on petition to review, C.A.D.C., No. 72–1277; *General Electric Co.* v. *National Labor Relations Board*, 412 F. 2d 512, 514–515 (C.A. 2); *General Telephone Co. of the Southeast*, Case Nos. 5–CB–1279, *et al.*, complaint authorized.

[9] See Proceedings of the United Steelworkers of America, 15th Constitutional Convention (1970), p. 108; 1971 Proceedings Industrial Union Department, AFL–CIO, Ninth Constitutional Convention, p. 147.

Court grants review in this case and clarifies the responsibilities of both negotiating parties with respect to company-wide bargaining.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1972.

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IN THE

Supreme Court of the United States

October Term, 1972

Nos. 72-220 and 72-359

PHELPS DODGE CORPORATION,

Petitioner,

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE CORPORATION, *et al.* and NATIONAL LABOR RELATIONS BOARD,

Respondents.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, *et al.*, and PHELPS DODGE CORPORATION,

Respondents.

BRIEF OF KENNECOTT COPPER CORPORATION, *AMICUS CURIAE,* IN SUPPORT OF THE PETITIONS FOR A WRIT OF CERTIORARI

Kennecott Copper Corporation ("Kennecott") files this brief as *amicus curiae* in support of Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit (Nos. 72-220 and 72-359) to review the judgment of that Court entered on May 9, 1972 in *AFL-CIO Joint Negotiating Committee for Phelps Dodge, et al. v. National Labor Relations Board,* the amended opinion

dated May 25, 1972 in connection with which is reported at 459 F.2d 374.[1]

All parties to that case have consented to the filing of this brief, and copies of their letters of consent have been filed herewith.

Background of the Case

The case below arose from negotiations in 1967 and 1968 between Phelps Dodge Copper Corporation ("Phelps Dodge") and various unions representing certain of its employees in its so-called Western Operations. After the unions had first asked for and Phelps Dodge had refused joint bargaining on a company-wide basis, the unions persisted in certain bargaining demands and tactics (including conditioning settlement on simultaneous and satisfactory settlements of contracts in other bargaining units in a refinery and in fabricating plants separate from the Western Operations, and an eight-month strike in support of their demands) which the National Labor Relations Board (the "Board") found to be an unlawful attempt to negotiate beyond the scope of the properly established bargaining unit and a violation of the requirement of Section 8(b)(3) of the National Labor Relations Act (the "Act") that the unions bargain in good faith.

The Court of Appeals set aside the Board's order as not substantiated by the record and as being without a basis in law.

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1. The decision of the Court of Appeals for the Third Circuit may be found at page A-1 of the Appendix to the Petition For a Writ of Certiorari in No. 72-220, this Term.

Kennecott's Interest

Kennecott is a New York corporation. Like Phelps Dodge it carries on copper mining operations in the Western part of the United States. Like Phelps Dodge, Kennecott has a refinery, fabricating plants, and other operations which are not a part of its Western copper properties and the union-represented employees of which are in different bargaining units from those of the Western copper properties. Like Phelps Dodge, Kennecott negotiated in 1967 and 1968 with various unions with regard to certain employees of its Western copper properties. As in the case of Phelps Dodge, the unions sought throughout the negotiations in one way or another to expand the negotiations beyond the scope of the bargaining involving the Western copper properties and ultimately went out on strike for eight months in support of these demands. Like Phelps Dodge, Kennecott filed an unfair labor practice charge with the Board. The Board's Trial Examiner found the unions' conduct to have been an attempt to force Kennecott to bargain beyond the scope of the Western copper properties and to have violated Section 8(b)(3) of the Act. The unions took no exceptions to the Trial Examiner's decision, and that decision thus automatically became the decision of the Board. No litigation occurred in the Court of Appeals and the Board's order is outstanding against the unions.

While the Board's order in Kennecott's case is outstanding and while there are factual differences between this case and Kennecott's case which Kennecott believes make it unlikely that the order in Kennecott's case would be denied enforcement because of whatever may be the outcome

of this case, Kennecott, as a copper producer and industrial employer which has been shut down on strike for eight months at the same time as Phelps Dodge, has a material interest in this Court's determination of this case.

Reasons for Granting the Petitions

1. Few areas of law directly touch as many people as that of labor relations. The importance of that field is evidenced by the increasing number of such cases which find their way onto the docket of this Court.

If one were to poll the leaders of labor and industry and the labor relations press across the country with regard to what they consider the most important unresolved question in labor relations today, it would not be surprising if leading the list were the questions raised by what some call "coalition bargaining", including how far may unions properly go in forcing the merger of established bargaining units, or, put another way, in coercing an employer or employers to agree to bargain in the negotiations with regard to one established bargaining unit about terms and conditions of employment to be effective in one or more other established bargaining units.

Among the consequences turning on the answer are

—the extent to which the Board will continue to be (as the Board considers that Section 9 of the Act requires it to be) the arbiter of the appropriate unit for collective bargaining purposes;

—the extent to which the union and employees in one activity should be in a position through pressure

on the employer in that activity to impose terms and conditions of employment on another and perhaps quite unrelated activity;

—the extent to which decisions affecting the interests of the union and the employees in one activity should be taken out of the hands of those most closely concerned with the consequences of those decisions;

—the extent to which unions should be in an improved position because of disputes local to one activity to shut down a substantial part of an industry with (as happened in the case of the eight-month strike against Phelps Dodge, Kennecott and others in the copper mining industry in 1967 and 1968) significant loss of domestic production of products vital to domestic industry, loss of domestic employment and adverse impact on the country's balance of payments;[2] and

—the extent to which, through expanded bargaining units within and across industry lines, unions should be in an improved position to discourage wage differences between groups of employees without regard to differences in the other costs of and consumer demand for what they make, and thus to increase domestic inflationary pressures and the likelihood of disappearance of or export of jobs as the costs of particular products become higher than their consumer is willing to pay.

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2. *Joint Statement on Copper Panel Report By Secretaries of Commerce and Labor* (1968), printed as the appendix hereto, and Cuernish, *Coalition Bargaining*, p. 200 (1969).

An important federal question calling for the guidance of this Court is at issue.

2. The decision of the Court of Appeals for the Third Circuit is at odds with the decisions of the Courts of Appeals for the Second, Fifth and Sixth Circuits.

The unions in the *Phelps Dodge* case sought expansion of the historical bargaining units and insisted on such expansion despite its rejection by Phelps Dodge. The unions' doing so was as much a violation of Section 8(b)(3) of the Act as in *Douds v. International Longshoremen's Association*, 241 F.2d 278 (2d Cir., 1957) the respondent union violated Section 8(b)(3) when it "insisted that the Association 'bargain with them for all employees engaged in longshore work in all ports from Portland, Maine to Brownsville, Texas' after the National Labor Relations Board had decided that the appropriate unit for bargaining was the Port of Greater New York and vicinity" (at 241 F.2d 281).

> ". . . The parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit of bargaining. That question is for the Board to decide on a petition under Section 9(c) of the Act, and its decision is conclusive on the parties. . . . although the decision may subsequently be changed.
>
> • • •
>
> "The process of change not permitted by the Act is one that denies the Board this ultimate control of the bargaining unit and disrupts the bargaining process itself. This is precisely what occurs when, after the Board has decided what the appropriate bargaining unit is, one party over the objection of

> the other demands a change in that unit. Such a demand interferes with the required bargaining 'with respect to rates of pay, wages, hours and conditions of employment' in a manner excluded by the Act. It is thus a refusal to bargain in good faith within the meaning of Section 8(b)(3)." (At 241 F.2d 282, 283.)

In *Standard Oil Company v. National Labor Relations Board*, 322 F.2d 40 (6th Cir., 1963), agreement regarding the unit at hand was reached orally and then the respondent unions announced that they would not end their strike until agreement was reached in still other bargaining units. The unions' conduct was held to have violated Section 8(b)(3) of the Act. Whether it is early (as in the *Phelps Dodge* case) or late (as in the *Standard Oil* case) in the negotiations that a union takes the position that it will not settle in the bargaining unit at hand until settlements are reached in still other bargaining units, the end result is the same—the collective bargaining which the Act is designed to encourage slams to a halt. In the one case the union reaches the point of signing and then balks until agreements are reached in other bargaining units. In the other the union anticipates that by announcing at some earlier stage that there can be no settlement at all until settlement is reached in still other bargaining units. In either event there is a refusal to bargain with an open mind with regard to the terms and conditions of employment to be applicable in the bargaining unit immediately at hand. If anything, the offense of the union which (as in the *Phelps Dodge* case) takes this adamant position at an early stage in the bargaining is the more aggravated, since bargaining is stalemated that much earlier in the game.

In *National Labor Relations Board v. South Atlantic and Gulf Coast District International Longshoremen's Association*, 443 F.2d 218 (5th Cir. 1971) the Court of Appeals for the Fifth Circuit was presented with a situation similar to that in the *Standard Oil* case. The case arose from a labor dispute in the ports of Texas in the fall and spring of 1968-69. After a long strike, the longshoremen reached an agreement on all contract issues; but they refused to execute the agreement until agreement had been reached between the employers and another unit of employees consisting of clerks and checkers. Although the longshoremen did not attempt directly to bargain about the terms of the other contract, the Board found their refusal to execute their own agreement until agreement had been reached in another unit to be a violation of Section 8(b)(3) of the Act, and the Court of Appeals for the Fifth Circuit ordered enforcement of its order.

The Court's attention is also called to *National Labor Relations Board v. International Brotherhood of Electrical Workers*, 266 F.2d 349 (5th Cir., 1959).

Kennecott's case is a classic example of the complete frustration of collective bargaining which results from this technique. In the negotiations for Kennecott's Western properties, the unions insisted upon talking about terms and conditions to be applicable to, for example, a lead and zinc producing unit different from the Western copper properties, and insisted that there could be no settlement with regard to the Western copper properties until there was a settlement with regard to the lead and zinc bargaining unit. Meanwhile in the charade bargaining going on at the lead and zinc property, the unions insisted that there

be no settlement with regard to the lead and zinc bargaining unit until they achieved the terms and conditions ultimately agreed upon in the Western copper properties. Thus the Western copper properties could reach no settlement until there was a settlement with regard to the lead and zinc bargaining unit, while at the same time no settlement could be reached with regard to the lead and zinc bargaining unit until a settlement was made for the Western copper properties. A settlement with respect to each was dependent upon a settlement with respect to the other, and as a consequence collective bargaining was effectively stalemated with regard to both.

The Court of Appeals for the Third Circuit has failed to disapprove the demands and tactics condemned by the Court of Appeals for the Second, Fifth and Sixth Circuits. Review by this Court is in order.

3. The decision of the Court of Appeals for the Third Circuit is also in conflict with observations by this Court.

This Court has made clear that insistence to an impasse on a non-mandatory subject of bargaining is a violation of the Act's good faith bargaining requirements. *National Labor Relations Board v. Borg-Warner*, 356 U.S. 342 (1958). In finding that the unions' conduct in the *Phelps Dodge* case did not violate these requirements, the Court of Appeals for the Third Circuit acted in conflict with this Court's observations in *United Mine Workers of America v. Pennington et al.*, 381 U.S. 657 (1965). There this Court spoke of the duty to bargain as a "duty to bargain unit by unit" and said that "the union's obligation to its members would seem best served if the union retained the ability to respond to each bargaining situation as the indi-

vidual circumstances might warrant" (at 666). While the Sherman Act rather than Section 8(b)(3) of the National Labor Relations Act was there at issue, nothing in this Court's opinion suggests that there should be any difference in their construction in this respect.

Conclusion

For the foregoing reasons it is requested that a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be issued.

August 30, 1972

Respectfully submitted,

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Of Counsel

APPENDIX

Joint Statement on Copper Panel Report by Secretaries of Commerce and Labor

(Issued February 17, 1968)

We received today the report of the special three-member panel in the prolonged copper strike. We regret that the panel had to report to us that the parties have been unable to reach agreement. However, we appreciate the dedication with which the panel worked on this matter and share their view that a basis does exist for a prompt resolution of the dispute.

The public hearings and private meetings the panel conducted with the companies and unions brought out clearly that the issue of "company-wide bargaining" is blocking a settlement.

We agree with this distinguished panel that the only way to reach a fair and speedy solution to this dispute is for the parties to discard their rigid preconditions for settlement and to begin bargaining immediately on the basis of the panel's suggestions.

The panel stated that bargaining should concentrate on the economic issues but should also include discussion of uniform expiration dates and equality of treatment within these three categories:

(1) Copper mining, smelting and refining; (2) units producing other non-ferrous metals and (3) copper wire and cable and brass fabrication.

We feel the guidelines suggested by the panel members (Professor George W. Taylor, the Rt. Rev. Msgr. George

G. Higgins and George E. Reedy) provide a sound basis for ending this dispute which is causing severe economic hardship to the parties involved and to a number of areas of the country and is having a serious, adverse impact on our Nation's balance of payments position. We strongly urge the parties to resume bargaining immediately within the framework of these suggestions. The national interest requires a prompt settlement of this dispute.

FILE COPY

SEP 15 1972

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-220

PHELPS DODGE CORPORATION,

vs. *Petitioner,*

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE CORPORATION, ET AL.,

and

THE NATIONAL LABOR RELATIONS BOARD,

Respondents.

No. 72-359

NATIONAL LABOR RELATIONS BOARD,

vs. *Petitioner,*

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, ET AL., AND PHELPS DODGE CORPORATION,

Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI.

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THE SUPREME COURT PRINTING COMPANY, CHICAGO

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Respondents.

BRIEF AMICUS CURIAE ON BEHALF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

INTEREST OF THE AMICUS CURIAE.

The Chamber of Commerce of the United States of America (hereafter "the Chamber") files this brief *amicus curiae* to present its views on a case of great significance in the administration of the National Labor Relations Act.[1] Respondent Committee represented to the Board that this is "one of the most important cases—if not the most important case—to come before the Board in many years."[2] The Chamber agrees and, for this reason, submits that this Court should review the instant case.

The issue presented here—whether the Board may conclude that an attempt to obtain agreement on terms and conditions of employment to be generally applicable on a company-wide basis constitutes an impermissible effort to extend the bargaining unit—is of substantial interest to the Chamber.[3] Many of its members deal with unions which represent, as the Committee did here, employees in two or more bargaining units. This case, as the court of appeals modified opinion made clear,[4] is not limited to the particular

1. This brief is filed with the written consent of all parties in accordance with Rule 42(2) of this Court.

2. See the Committee's Brief in support of exceptions to the Board Trial Examiner's Decision, p. 1.

3. The Chamber is a business federation with a membership of more than 3800 state and local chambers of commerce and trade associations. It has an underlying membership of more than five million businessmen and business firms, many of which are engaged in commerce and subject to the Act.

4. In its initial decision, the court did not pass on the question of whether bargaining to impasse on mandatory subjects could be considered evidence of an unlawful objective to expand the bargaining unit. In the court's modified order, however, the court expressly assumed that the Committee's demands were all mandatory items and concluded nevertheless that insistence to impasse upon them was "not evidence of an attempt to merge the bargain-

factual situation here involved; it would substantially alter existing bargaining relationships in each of these other situations as well. As the Board observed in its petition for certiorari (p. 8), the decision would permit unions in numerous industries to unilaterally enlarge bargaining outside the confines of established bargaining units.[5] This is a matter of vital concern to the Chamber and its member organizations. For example, the Chamber recently appeared as an *amicus curiae* in *Allied Chemical Workers* v. *Pittsburg Plate Glass Company*, 404 U. S. 157 (1971), where it successfully requested this Court to confine mandatory bargaining to the active employees in an appropriate unit.

The Chamber has a similar interest in this case and respectfully requests this Court to consider its views.

SUMMARY OF ARGUMENT.

This case presents the Court with board issues of far-reaching legal and economic significance.

First, despite the national controversy generated by the issue of coalition or coordinated bargaining this Court has never had an opportunity to pass on the question. Because of increased union efforts to expand bargaining units, determination by this Court of the questions presented in this

---

ing of separate units." App., p. A. 13. Thus, the court not only decided that the Board's decision was not supported by substantial evidence, but was wrong on a material question of law, i.e., whether an improper bargaining object could *ever* be determined where a union does not use improper bargaining means.

5. In addition to the enlarged unit bargaining in the nonferrous metals industries, as shown here, there is a strong likelihood of such bargaining in other major industries, where, as here, there is uniform bargaining by a small number of employers. Examples of such industries are the home products, chemical and oil industries. See William M. Chernesh, *Coalition Bargaining* (University of Pennsylvania Press 1969).

case is imperative. It is apparent, as hereafter noted at pp. 3-5, that the union approach here involved, in view of its approval by the court below, is now being frequently emulated by other powerful unions in major industries. This Court should determine the lawfulness of this new and destructive bargaining tactic.

Second, the decision below alters, without legislative approval, the economic balance of power between employers and unions. As one commentator has suggested, the goal of coalition and related forms of inter-unit bargaining ". . . is to bring about unilaterally an enlargement of the scope of negotiations and of decision-making to embrace a fragmented group of bargaining units that had hitherto negotiated separately."[6] We submit that only Congress, not the courts, can determine whether such a goal is appropriate. As this Court noted in *American Ship Building Co.*, v. *NLRB*, 380 U. S. 300, 317 (1965), citing *N. L. R. B.* v. *Insurance Agents' International Union*, 361 U. S. 477, 497-498 (1960), the Board cannot ". . . introduce some standard of properly 'balanced' bargaining power, or some new distinction of justifiable and unjustifiable, proper and 'abusive' economic weapons into . . . the Act." Economic and social judgments must remain within the discretion of the legislature; they are not within the province of courts or administrative agencies.

Third, the Court below by naively and myopically viewing the Committee's demands sanctioned unilateral enlargement of the bargaining units. The effect was to judicially amend the Act, and disregard the Board's expertise in

6. Hildebrand, *Bargaining Structures and Relative Power*, Report No. 5, *Collective Bargaining: Survival in the 70's* (Industrial Research Unit, Wharton School of Finance & Commerce, University of Pennsylvania 1972), p. 10.

determining the unit in which bargaining is to take place. Moreover, in so doing, the Court below misapplied decisions of this Court, and acted in derogation of the recent decision of this Court in *Pittsburgh Plate Glass*.

ARGUMENT.

A. The Decision Below Will Lead to the Breakdown of the Stable Bargaining Units Envisaged by the Act.

The approval by the Court below of a union charade to engage in enlarged unit bargaining will lead to a breakdown of collective bargaining in numerous multi-unit companies. No longer will employers be required to bargain only within the confines of stable units established in accordance with the Act; rather, simply by following the blueprint drafted by the court below—making mandatory demands which have the intent and effect of enlarging an established unit—a union can extend negotiations to new units without the voluntary employee choice contemplated by our national labor policy. Instead of stabilizing bargaining, this technique will inexorably lead to a severe dislocation of free collective bargaining in contravention of the intent of the Act.

Indeed, a few recent examples clearly illustrate the rapidly increasing utilization of extra unit bargaining with its concommittant reigniting of long and often painfully resolved disputes regarding the appropriate bargaining unit.

Item 1: In negotiations this year between Armstrong Cork Company and a coalition of unions under the leadership of the Industrial Union Department of the AFL-CIO, the unions at numerous locations made bargaining demands,

such as a limited no strike clause, a common company-wide termination date and a "most favored nations" clause, identical to those involved in the instant case. The basis for the unions' demand was expressly stated to be the decision of the court below. The unions thus hoped to accomplish through this device the goal of "coordinated" negotiations, a goal which had already led to violence, strikes, lockouts and the disruption of a previously peaceful relationship. See the affidavit of L. J. Bibri, attached hereto as Appendix A.

Item 2: In another situation which closely parallels the instant case, a coalition composed of the International Brotherhood of Electrical Workers and four of its local affiliates sought to merge all units represented by any member of the coalition in the General Telephone Company of the Southeast into a single unit.[7] As in the instant case, this coalition has demanded, as the condition precedent to the conclusion of any contract, a common expiration of all contracts.

Item 3: In another variant of the instant theme, during recent negotiations between Shell Oil Company and the Oil, Chemical and Atomic Workers International Union, a union tried to force a unilateral merger of separately certified bargaining units for the purpose of negotiating uniform fringe benefits. In *Shell Oil Co.*, 194 NLRB No. 166 (1970), the Board found, relying on its decision here (now set aside by the court below), that the company's refusal to engage in such enlarged unit bargaining did not violate the Act. The union has now appealed that decision on the basis of the court of appeals opinion in the present case. A similar approach was utilized by the Industrial Union De-

7. See complaint issued by the Director of Region 11 of the Board in Case No. 5-CB-1279, attached hereto as Appendix B.

partment of the AFL-CIO in 1966 negotiations with Union Carbide Corporation; the I. U. D.'s goal there also, was "to force companies to negotiate major economic items on a national level." The result was strikes at eleven Union Carbide plants, which ranged from 44 to 246 days, involved 7200 hourly paid employees, the loss of $20.5 million in wages and cost the company almost $3.5 million in pre-tax income. 1967 Lab. Rel. Yearbk. 84, 85, 91.

As more and more unions in multi-unit companies learn the lesson taught by the court below, they also will seek to improperly enlarge their bargaining power by demanding enlarged unit bargaining. The cost will be industrial strife and economic dislocation. The Chamber submits, therefore, that the decision below is not only incorrect, but that it has severe, far-reaching economic consequences involving the very structure of the institution of collective bargaining. This Court should address itself to the legality of this serious national problem.

B. The Court Below Has Misconstrued the Controlling Decisions of This Court.

In reversing the Board, the Court below relied on four decisions of this Court.[8] Upon the basis of these cases, the Court sanctioned the enlarged-unit bargaining techniques of the Union on the ground that "the fact that a demand may have extra unit effects does not alter its status as a mandatory subject of bargaining." (App., p. A13.) In enunciating this rule, however, the Court below overlooked the fact that none of the cited decisions sanctioned unilateral enlarge-

8. *Fibreboard Paper Products Corp.* v. *N. L. R. B.*, 379 U. S. 203 (1964); *American Federation of Musicians* v. *Carroll*, 391 U. S. 99 (1968); *Teamster's Union* v. *Oliver*, 358 U. S. 283 (1959); *Allied Chemical Workers* v. *Pittsburgh Plate Glass Co.*, *supra*.

ment of the unit such as occurred in this case. *Fibreboard*, *Carroll* and *Oliver*, all arising in a subcontracting or unit preservation context, do not require a company to bargain about demands which enlarge a unit, but only to bargain about demands which, while having coincidental "extra-unit effects," concern the preservation of unit work or unit jobs.[9] Indeed, in *Pittsburgh Plate Glass*, this Court not only so limited *Fibreboard* and *Oliver* but indicated as well that "[o]ther considerations, such as the effect on the employer's freedom to conduct his business, may be *equally important*." 404 U. S. at 179, n. 19 (emphasis added).

In the instant case, the Committee did not seek to preserve unit work or jobs, but, rather, sought to enlarge the unit for its own bargaining advantage. Such an objective disregards the admonition of this Court in *Pittsburgh Plate Glass Co.* that an employer's bargaining obligation extends only "to 'terms and conditions of employment' in the unit 'appropriate to such purposes' which the union represents,"

9. In *Fibreboard*, the Court held that "replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under Section 8(b)." 379 U. S. at 215. In *Oliver* and in *Carroll*, this Court dealt with the question of whether certain combinations or agreements violated anti-trust laws. In *Oliver*, the Court found that a provision of a collective bargaining agreement regulating truck rental paid to independent truck drivers was a mandatory subject of bargaining and did not therefore violate Ohio's anti-trust law. The Court said that ". . . an inadequate rental might mean the progressive curtailment of jobs through withdrawal of more and more carrier-owned vehicles from service." 358 U. S. at 295. Similarly, in *Carroll*, this Court held that a labor agreement provision requiring an orchestra leader to charge a minimum price does not violate the Sherman Act because "the price list . . . has the objective to protect employees' job opportunities and wages from job competition of other union members . . ." 391 U. S. at 101-102.

and not to extra-unit bargaining. The area of unit determination is one which singularly involves Board expertise; its decisions are to be "accorded broad discretion." The objective must be one of grouping together only employees who have "substantial mutual interests" in order "to assure the coherence among employees necessary for efficient collective bargaining." 404 U. S. at 171-172. The decision below, it is submitted, disregards these principles.

C. The Decision Below Raises a Substantial and Recurring Question in the Administration of the Act.

Even assuming *arguendo* that the specific extra-unit demands of the Committee are mandatory bargaining subjects, such demands, when considered together with, and in the context of, the Committee's goal of company-wide bargaining, had the clear intent and effect of impermissibly enlarging the bargaining unit and of merging all of the Company's operations into a single unit. As the Court of Appeals for the Second Circuit pointed out in *N. L. R. B. v. General Electric Co.*, 418 F. 2d 736, 760 n. 15 (1969), *cert. den.*, 397 U. S. 965 (1970), in determining that an employer's overall conduct of negotiations was unlawful even though his individual actions considered alone were proper:

> . . . A policy . . ., innocent in and of itself, can in context become a vital part of an illegal overall pattern of conduct.

Similarly, in this case, the Committee's demands, when considered *in toto*, unilaterally enlarged the bargaining

unit.[10] The Committee's willingness to bargain separately at each location, as the Board recognized, was a sham. The items it demanded, if made part of a collective bargaining agreement, would necessarily have precluded separate unit negotiations, and would have effectively merged all of the Company's plants into a single overall unit. Before agreeing, for example, on a wage adjustment at any one plant in its operation, the Company would be constrained to consider its effect on all units; under the "most favored nation" clause, a more favorable wage adjustment would automatically be incorporated into a contract covering all other represented units. Similarly, if the proposed limited no strike clause were adopted, the Company could never make a decision to accept a strike at any one location without at the same time determining whether it could accept a strike at all of its other locations. To the same effect, the common expiration date demand would, as a practical

10. In enacting Section 9 of the Act, Congress established a detailed procedure for collective bargaining. An established bargaining unit cannot be altered by unilateral action of one of the parties, but only through mutual consent or through utilization of the Board's representation procedures. *International Longshoremen's Association (New York Shipping Association, Inc.)*, 118 NLRB 1841, 1843, enforcement denied on other grounds, 277 F. 2d 681 (D. C. Cir. 1960); *N. L. R. B.* v. *Montgomery Ward & Co., Inc.* 399 F. 2d 409, 412 (7th Cir. 1968); *Dauds* v. *I. L. A.*, 241 F. 2d 278, 282-283 (2nd Cir. 1957); *Central Soya Company Inc.*, 142 NLRB 930, 949; *Textile, Inc.*, 119 NLRB 1792, 1797-1798. Absent agreement, neither employer nor union "may attempt to force on the other an enlargement or merger of an established unit or units." *Shell Oil Co., supra*. Accord: *N. L. R. B.* v. *Hess Oil & Chemical Corp.*, 415 F. 2d 440, 444 (1969), cert. denied 397 U. S. 916 (1970); *The Standard Oil Company*, 137 NLRB 690, 691 (1962) enforced 322 F. 2d 40 (6th Cir. 1963). Indeed the antitrust, as well as the labor, laws are "clearly set against employer-union agreements seeking to prescribe labor standards outside the bargaining unit." *United Mine Workers* v. *Pennington*, 381 U. S. 657, 668 (1965). In sum, once the duty to bargain exists, change which "... denies the Board ... ultimate control, of the bargaining unit ... disrupts the bargaining process." *Dauds* v. *I. L. A.*, *supra* at 283.

matter, merge negotiations at all Company locations. Moreover, the Committee expressly refused to execute an agreement in any one unit until agreement was reached in all other pending negotiations. In short, under the decision below, the Company would no longer be negotiating on a unit-by-unit basis as required by Section 9 of the Act, but, as a matter of absolute economic necessity, would be compelled to negotiate with the unions on a company-wide basis."

CONCLUSION.

This case raises a recurring and substantial problem in the administration of the Act. It is an issue which, unless resolved by this Court, is likely to engender further severe economic dislocation. By considering this question, the Court's time will not be misspent. The petitions for writs of certiorari should be granted.

Respectfully submitted,

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11. This result is wholly inconsistent with this Court's repeated warning that it "must not be guided by a single sentence or number of a sentence, but look to the provisions of the whole law, and its object and policy." *Pittsburgh Plate Glass*, 404 U. S. at 185, citing, *inter alia Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270 (1956).

APPENDIX A.

AFFIDAVIT

STATE OF PENNSYLVANIA
COUNTY OF LANCASTER } ss

I, L. J. Bibri, being first duly sworn on my oath depose and state as follows:

1. I am Vice President and Director of Employee Relations of the Armstrong Cork Company, Liberty and Charlotte Streets, Lancaster, Pa., 17604. I was employed as Director of Employee Relations during both the current and the 1970 contract negotiations when our company was confronted by a coalition of unions representing all 8 of our unionized plant locations under the leadership of the Industrial Union Department of the AFL-CIO.

2. On various dates between April 13 and August 2, 1972 plant managers at our Macon, Georgia, Jackson, Mississippi, Fulton, New York, Braintree, Massachusetts and Beaver Falls, Pennsylvania plants received from local unions representing these respective plants the following contract demands:

a) There shall be no strikes in the bargaining unit covered by this agreement during the life of this agreement; provided that this no-strike clause shall not be effective during any period in which employees are conducting a lawful strike in any other bargaining unit of the Company.

b) The termination date of this agreement be the same as the termination dates in other agreements negotiated by the Company in 1972.

c) When, during the term of this agreement, the Company negotiates an agreement covering any other

bargaining unit of the Company, the Union shall have the right, upon demand, to have any provision of said agreement incorporated into this agreement.

In support of these demands, the unions at Macon, Jackson and Fulton presented identical documentation citing in each instance the Third Circuit Court of Appeals decision of *AFL-CIO* v. *Joint Negotiating Committee for Phelps Dodge* v. *NLRB*, 79 LRRM 2939 (3rd Cir. 1972), petition for certiorari filed in Case Nos. 72-220 and 72-359 (S. Ct. Oct. term, 1972). At the other locations the same demands were presented in substance as part of basic contract proposals. While documentation was not offered, the demands were described as being of the same orgin as those listed above.

3. This tactic was merely a refinement of the demands made by the coalition in the 1970 negotiations, prior to the *Phelps-Dodge* decision, where, under the direction of the Industrial Union Department, separately certified unions at these plants located throughout the United States presented the Company with uniform demands for changes in the pension and insurance supplements in effect at those locations. In the negotiations which ensued, it became obvious to me, and the records so support, that the IUD's strategy was (a) to fail to reach agreement on both the supplement and the basic contract upon the expiration date at each of the plants in turn, and (b) to offer to work without a contract until all of the plant agreements in the company had expired so as to effect, if necessary, a multi-plant shut-down.

4. IUD representatives were frequently present at contract negotiations at each separate location. As a result of these union tactics, prolonged multi-plant strikes occurred at our plants as follows:

a) Macon, Georgia, September 3, 1970 to November 4, 1970;

b) Beaver Falls, Pennsylvania, August 15, 1970 to November 14, 1970;

c) Fulton, New York, August 19, 1970 to November 16, 1970;

d) Braintree, Massachusetts:

1. Production unit, August 25, 1970 to November 10, 1970;

2. Maintenance unit: August 26, 1970 to November 16, 1970;

e) Jackson, Mississippi: September 1, 1970 to November 7, 1970.

I have read the above affidavit consisting of this page and two other pages. It is true and correct to the best of my knowledge.

/s/ L. J. Bibri

APPENDIX B.

UNITED STATES OF AMERICA

Before the National Labor Relations Board Region 11.

	Cases Nos.
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and ITS LOCALS 289, 2035, 1431 and 1087	11-CB-359
and	11-CB-359-2 (formerly 5-CB-1279)
GENERAL TELEPHONE COMPANY OF THE SOUTHEAST	11-CB-359-3 (formerly 10-CB-2141)
	11-CB-359-4 (formerly 26-CB-725)

ORDER CONSOLIDATING CASES, COMPLAINT, AND NOTICE OF HEARING

It having been charged in Cases Nos. 11-CB-359, 11-CB-359-2 (formerly 5-CB-1279), 11-CB-359-3 (formerly 10-CB-2141) and 11-CB-359-4 (formerly 26-CB-725), by General Telephone Company of the Southeast, herein called General Telephone, that International Brotherhood of Electrical Workers, AFL-CIO, and its Locals 289, 2035, 1431 and 1087, herein collectively called Respondents, have engaged in and are engaging in unfair labor practices effecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U. S. C. Sec. 151, *et seq.*, herein called the Act, and the General Counsel of the National Labor Relations Board, herein called the Board, by the undersigned Regional Director for the 11th Region, having duly considered this matter, and it being deemed necessary to

consolidate said cases in order to effectuate the purposes of the Act and to avoid unnecessary costs or delay,

IT IS HEREBY ORDERED, pursuant to Section 102.33 of the Board's Rules and Regulations, Series 8, as amended, that these cases be, and they hereby are, consolidated.

Upon said charges the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

1.

A copy of the charge in Case No. 11-CB-359 filed on June 29, 1972, was duly served upon International Brotherhood of Electrical Workers, AFL-CIO, herein called Respondent International, and International Brotherhood of Electrical Workers, Locals 1087, 289, 2035 and 1431, herein called Respondent locals 1087, 289, 2035 and 1431, respectively, by registered mail on June 29, 1972. A copy of the charge in Case No. 11-CB-359-2 (formerly 5-CB-2179) filed on June 28, 1972, was duly served upon Respondents by registered mail on June 29, 1972. A copy of the charge in Case No. 11-CB-359-3 (formerly 10-CB-2141) filed on June 28, 1972, was duly served upon the Respondents by registered mail on June 29, 1972. A copy of the charge in Case No. 11-CB-359-4 (formerly 26-CB-725) filed on June 29, 1972, was duly served upon Respondents International Brotherhood of Electrical Workers, Locals 1087 by registered mail on June 29, 1972, and Respondents Local 1431, Local 2035, and Local 289 on June 30, 1972.

2.

On July 27, 1972, the General Counsel of the Board, pursuant to Section 102.33 of the Board's Rules and Regula-

tions, Series 8, as amended, ordered that the aforesaid Case Nos. 5-CB-2179, 10-CB-2141, and 26-CB-725 be transferred to and continued in the 11th Region of the Board as Case Nos. 11-CB-359-2, 11-CB-359-3, and 11-CB-359-4, respectively.

3.

General Telephone is and has been at all material times herein, a Virginia corporation maintaining its principal office in Durham, North Carolina, with plants and exchanges in the States of North Carolina, Virginia, South Carolina, Tennessee, West Virginia, Alabama and Virginia, where it is engaged as a public utility in providing local and long distance telephone service to customers in each of these states.

4.

General Telephone has an annual gross income in excess of $1,000,000, and it provides toll call services valued in excess of $50,000 annually.

5.

General Telephone is, and has been at all times material herein, engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

6.

The Respondent International and Respondent Local 289, Local 1431, Local 2035 and Local 1087, are, and have been, at all times material herein, labor organizations within the meaning of Section 2(5) of the Act.

7.

All employees assigned to General Telephone's plant, commercial, engineering, accounting, budget, data coordination, marketing and traffic departments in its General Office and North Carolina Division, constitute a unit ap-

propriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. These employees perform line man, switch man and installation work in connection with General Telephone's, providing and maintaining telephone service for customers within the State of North Carolina.

8.

All employees assigned to General Telephone's commercial and engineering departments in its Charles Town-Rommey Districts of the West Virginia-Virginia Division, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. These employees perform line man, switch man and installation work in connection with General Telephone's providing and maintaining telephone service for customers within the State of West Virginia.

9.

All employees assigned to General Telephone's traffic and commercial departments in its South Carolina Division, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. These employees perform line man, switch man and installation work in connection with General Telephone's providing and maintaining telephone service for customers within the State of South Carolina.

10.

All employees assigned to General Telephone's traffic and commercial departments in its Tennessee Division constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. These employees perform line man, switch men and installation work in connection with General Telephone's

providing and maintaining telephone service for customers within the State of Tennessee.

11.

At all times since on or about 1955, and continuing to date, Local 289 has been a representative of the employees in the unit described in paragraph 7 above for the purposes of collective bargaining, and by virtue of Section 9(a) of the Act has been, and is now, the exclusive representative of all the employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

12.

At all times since on or about November 21, 1958, and continuing to date, Local 2035 has been a representative of the employees in the unit described in paragraph 8 above for the purpose of collective bargaining, and by virtue of Section 9(a) of the Act, has been, and is now, the exclusive representative of all the employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

13.

At all times since on or about April 1, 1968, and continuing to date, Local 1431 has been a representative of the employees in the unit described in paragraph 9 above for the purposes of collective bargaining, and by virtue of Section 9(a) of the Act has been, and is now, the exclusive representative of all the employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

14.

At all times since on or about 1957, and continuing to date, Local 1087 has been a representative of the employees in the unit described in paragraph 10 above for the purposes of collective bargaining, and by virtue of Section 9(a) of the Act has been, and is now, the exclusive representative of all the employees for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

15.

The following-named individuals occupy the positions in the labor organizations shown opposite their respective names, and are, and have been at all times material herein, agents of the respective labor organizations, within the meaning of Section 2(13) of the Act:

Thomas J. Murphy	— International Representative
Larry Kellaris	— International Representative
Arthur Holland	— President, Local 289
John Tyree	— President, Local 1087
Vernon W. Webster, Jr.	— President, Local 2035
E. J. Johnson	— President, Local 1431

16.

Since on or about March 5, 1972, and continuing thereafter, Respondents, despite the history of separate recognition of the respective locals in the respective units described above, and over the pretest of General Telephone, have insisted, with threat of strike, that General Telephone recognize a System Council as the exclusive collective bargaining representative of all the employees in the units described in paragraphs 7, 8, 9 and 10, above.

17.

Since on or about June 1, 1972, and continuing thereafter, Respondents have insisted, with threat of strike, upon a common expiration date for any collective bargaining agreements covering the employees described in paragraphs 7, 8, 9 and 10, above, in conjunction with their insistence on recognition of a System Council as described in paragraph 16, above.

18.

Since on or about June 1, 1972, and continuing thereafter, Respondents have insisted with threat of strike, that no collective bargaining agreement would be consummated for any one of the units described in paragraphs 7, 8, 9 and 10, above, unless agreements that all such units contained provisions for common expiration dates.

19.

Since on or about July 27, 1972, Respondents have engaged in a strike to require General Telephone to agree to their demands as set forth in paragraphs 16, 17 and 18, above.

20.

On or about May 22, 1972, Respondent Local 289 and General Telephone agreed upon all the terms and conditions of a collective bargaining agreement covering the employees in the unit described in paragraph 7, above, and General Telephone requested that Local 289 execute a written contract incorporating such agreement.

21.

Since on or about June 14, 1972, Respondent Local 289 has refused, and continues to refuse, to execute the collective bargaining agreement referred to in paragraph 20,

above, because it failed to provide for recognition of a System Council.

22.

By the acts described above in paragraphs 16, 17, 18, 19 and 21, above, the Respondents, and each of them, did refuse, and are refusing, to bargain collectively with an Employer, and thereby did engage in, and are engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

23.

The acts of the Respondents described in paragraphs 16, 17, 18, 19 and 21, above, occurring in connection with the operation of the Employer described above in paragraphs 3, 4 and 5, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

24.

The acts of Respondents described in paragraphs 16, 17, 18, 19 and 21, above, constitute unfair labor practices within the meaning of Section 8(b)(3) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 22nd day of August, 1972, at 10 a.m., E. D. T., in the Federal Courtroom, United States Post Office, Durham, North Carolina, a hearing will be held before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Form NLRB-4668, Statement of Standard Procedure in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases, is attached.

You are further notified that pursuant to Section 102.20 and Section 102.21 of the Board's Rules and Regulations, Series 8, as amended, you shall file with the Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to the said complaint within 10 days from service thereof, and that unless you do so, all the allegations in the above complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Winston-Salem, North Carolina, this 29th day of July, 1972.

/s/ REED JOHNSTON
Reed Johnston, Regional Director
National Labor Relations Board
Region 11
1624 Wachovia Building
Winston-Salem, North Carolina 27101

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-220

PHELPS DODGE CORPORATION, *Petitioner,*

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, et al., *Respondents.*

No. 72-359

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, et al., *Respondents.*

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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IN THE

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

When this case began, it appeared to pose a legal issue of great significance to the future course of collective bargaining in the United States. But neither the Board nor the court below reached or decided that issue. Nevertheless, in No. 72-220, the Company seeks to have this Court decide that issue. In No. 72-359, the Board seeks to have this Court rule upon a different legal theory, one which formed no part of the Board's decision, which made its first appearance in the Board's appellate brief, and which was not considered

by the court below because it constituted an effort by Board counsel at *post-hoc* rationalization of the Board's decision.

The rocky litigation path leading to this confused denouement can be retraced quickly.

I

This case arose out of an effort by unions representing employees in several of the Company's bargaining units to secure a synchronization of their separate collective bargaining agreements to the limited extent necessary to enable employees in the several units to strike at the same time. The unions hoped to end a history of impotence resulting from fragmented bargaining power: whenever employees in one unit were free to strike for improved benefits, their fellow employees in other units were under contractual no-strike prohibitions and thus could not strike in their support. In an effort to gain a modicum of bargaining power, the unions sought contractual modifications which would preserve the statutory right of employees in each unit to strike in support of their fellow employees in other units. *Houston Insulation Contractors Association* v. *NLRB,* 386 U.S. 664, 668-669 (1967).

The Company filed charges with the Board alleging that the unions' demands for synchronization were non-mandatory subjects of bargaining, and that by insisting upon them to impasse and striking in support of them the unions were violating Section 8(b)(3) of the Act, 29 U.S.C. § 158(b)(3). While the unions believe that their demands were clearly mandatory subjects of bargaining,[1] there is no ques-

[1] *Houston Insulation Contractors Association* v. *NLRB, supra, NLRB* v. *Insurance Agents International Union,* 361 U.S. 477 (1960); *U.S. Pipe and Foundry Co.* v. *NLRB,* 298 F.2d 873 (5th Cir. 1962); *Lynchburg Foundry Co.* v. *NLRB,* — F.2d —, 80 LRRM 2415, (4th Cir. 1972); *NLRB* v. *Peter Cailler Kohler Swiss Chocolate Co.,* 130 F.2d 503, 505-506 (2d Cir. 1942); *NLRB* v. *General Drivers,* 225 F. 2d 205, 210 (5th Cir. 1955); *NLRB* v. *Landis Tool Co.,* 193 F.2d 279, 282-283 (3rd Cir. 1952); *Dolly Madison Industries,* 182 NLRB No. 147, 74 LRRM 1230 (1970).

tion but that the ultimate resolution of this issue is one of great importance.

The Board, however, did not reach or decide this issue. Instead, it found as a fact that the unions in the Western Operations had also made *another* demand—that the Company discuss with them the benefits to be extended to the non-Western bargaining units—and held that *this* demand was violative of Section 8(b)(3).[2]

The unions petitioned for review, contending that the Board's factual finding was wholly without record support. The court below agreed (A11-A13):

> "We find that the Board's opinion and order are not substantiated by the record . . .
>
> * * * * *
>
> "Separate negotiations were conducted at each of the company's units. No bargaining was conducted at any unit with regard to wages, terms, or employment conditions at other locales.
>
> * * * * *
>
> "We conclude from this record that in the Arizona

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[2] "The Trial Examiner found, and we agree, that one of the Respondents' primary objectives throughout the course of bargaining at the Charging Party's Arizona operations was to obtain agreement on terms and conditions of employment to be applicable generally on a companywide basis, and that the strikes conducted by the Respondents throughout the Charging Party's facilities were intended, in substantial part, to force the Charging Party to accede to the Respondents' demands for such a companywide agreement. The record as a whole amply supports this conclusion.

* * * * *

"Accordingly, we find that the Respondents, by demanding that the Charging Party engage in companywide bargaining, beyond the scope of established bargaining units, and by striking in support of its demands, has violated Section 8(b)(3) of the Act." (A15, A19).

> negotiations petitioner unions did not insist that Phelps Dodge agree to terms and conditions of employment to be applicable generally to other bargaining units and that they did not strike to enforce such a demand."[3]

In their brief to the court below, Board counsel had sought to justify the Board's decision on an alternative ground. Conceding that perhaps there was no record evidence for the Board's finding that the unions in Western Operations had sought to negotiate for other units, Board counsel reasoned that the decision ought to be sustained anyway, for the "practical effect" of what the unions had actually done was no different from what the Board had erroneously found them to have done. Specifically, Board counsel argued that where unions in separate negotiations seek the same benefits, and each declares that it will continue striking in support of the others, the "practical effect" is the same as if one union had insisted upon negotiating the benefits for all units.

The court below expressly refrained from adjudicating this claim—the same claim which the Board now advances to this Court—because it was not the basis for the Board's decision but constituted merely "counsel's *post hoc* rationalizations for agency action" (A10):

> "We reiterate in order to emphasize the fact that the Board opinion and order must stand or fall upon the findings of fact and conclusions of law contained therein. In the instant case, counsel for the Board has advanced an argument in support of the Board's order

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[3] The Board's petition (p. 10) twice states that it is "undisputed" that the Unions "insist[ed] that the terms negotiated in one unit be extended to the other units." On the contrary the unions have disputed this throughout, and the court below found the record devoid of evidence of any such insistence (A11-A13).

that is really a rationalization of the Board's decision.[6] We may not consider such an argument. '[A]n administrative order cannot be upheld unless the grounds upon which the agency acted * * * were those upon which its action can be sustained.' SEC v. Chenery Corp., 318 U.S. 80, 95 (1943). We cannot accept counsel's *post hoc* rationalizations for agency action. NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438 (1965).

---

[6] The Board's brief argues that the effect of the demands made by the unions would be that employees in other units would receive the same terms and conditions as the employees in the Western Operations. The argument contends that, as a practical matter, the result would be the same as if the unions had negotiated for other units in the Western Operations negotiations. Since such an instance would have been violative of the Act, the Board's counsel contends that a course of conduct that is designed to achieve the same result is likewise violative. This was clearly not the import of the Board's decision, which found that the unions did seek to negotiate about terms and conditions in other units."

Finally, the court below reached the issue which the Board had avoided—whether the demands admittedly advanced by the unions were mandatory subjects of bargaining—and held that they were (A12-A13).

The Board petitioned for modification of the decision below, requesting that the court delete its holding that the unions' demands were mandatory subjects of bargaining. The Board's petition explained (p. 5):

> "The issue as to whether the demands . . . are mandatory or non-mandatory subjects of bargaining under the Act is a significant one, whose outcome may have a substantial impact on labor relations throughout the country. If, as we submit, the Board did not specifically pass upon, nor did Board counsel brief, that issue, we urge the Court to defer definitely deciding the matter until the Board has done so."

The Court below granted the Board's petition, and modified its opinion by deleting the holding that the unions' demands were mandatory subjects of bargaining (A12-A13).

II

As the foregoing account of the history of this litigation makes clear, the court below did not reach or decide the issues presented in either of the petitions for certiorari.

The lone question presented in the Company's petition (No. 72-220) is whether the unions' demand for simultaneous settlement is a mandatory subject of bargaining. But as the Board's petition for modification acknowledged, "the Board did not specifically pass upon, nor did Board counsel brief, that issue," and although the court below originally resolved that issue in the unions' favor, it granted the Board's request to modify its opinion and delete that holding.

The lone question presented in the Board's petition (No. 72-359) is whether the Board may invalidate assumedly mandatory bargaining demands where the practical effect of such demands is the same as if the unions in one unit had sought to negotiate terms applicable to other units. (Board petition, pp. 2, 11-12). The court below expressly refused to reach or decide that issue, declaring that it was not the basis for the Board's decision and constituted merely a *post-hoc* attempt by Board counsel to rationalize a Board decision actually predicated upon a different ground (A10, and n. 6 thereat).

CONCLUSION

The only issue actually decided below was a factual one: whether the unions in Western Operations had insisted that the Company bargain with them about non-Western units. The Board found that they had, but the court below held this finding to be without evidentiary support. This "substantial evidence" ruling hardly warrants this Court's attention and, not surprisingly, neither petition seeks review of it.

As to the more important issues which hovered over this case throughout but emerged undecided, we can add nothing to the point made so persuasively by the Board in its petition for modification below (p. 5): "[W]e urge the Court to defer definitively deciding the matter until the Board has done so."

Respectfully submitted,

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Respondents.

RESPONSE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO BRIEF IN OPPOSITION

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THE DUSTHOFF-WERNER PRINTING COMPANY, CHICAGO

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Respondents.

RESPONSE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA TO BRIEF IN OPPOSITION.

The Chamber of Commerce of the United States of America, as *amicus curiae*, previously demonstrated that, as stated in the Board's petition (p. 12), "[t]he question whether unions, by the kind of tactics utilized here, may

expand the scope of collective bargaining beyond established bargaining units is an important issue in the administration of the Act." The Respondents, while acknowledging that this question is one of "great significance to the future of collective bargaining in the United States", nevertheless oppose certiorari on the sole ground that the court below did not reach that issue. Br. in Opp., pp. 1, 6. This assertion is based on several misconceptions which require a brief response.

1. The court below decided more than a mere factual dispute. It directly sanctioned the Board-disapproved device of enlarging unit bargaining by "conditioning settlement of negotiations [in one bargaining unit] . . . upon simultaneous and satisfactory settlement of contracts in other bargaining units." App., p. A-2. The court admittedly did not rule in its modified opinion—as the Board similarly had not—on the separate question of whether the Unions' demands involved mandatory or non-mandatory subjects of bargaining. Rather, the court concluded, regardless of the disposition of *that* issue, the effect of the Unions' "over-all strategy" and "parallel action" was permissible. App., pp. A-7, A-8. It is *this* decision which constitutes the fundamental disagreement between the Board and the court, and is the critical question which the instant petitions now present to this Court.

2. The decision below, notwithstanding the asserted variance accorded to its precise holding, has caused a severe dislocation in well established labor-management relations. See Bd. pet., pp. 12-13; Phelps Dodge pet., pp. 15-16; Chamber br., pp. 5-7. That fact is not disputed. The Court of Appeals has enunciated a rule which, if permitted to stand, will have wide-spread ramifications on the future course of collective bargaining in multi-unit companies throughout the nation. Such an issue clearly is "beyond the academic or the

episodic." *Rice* v. *Sioux City Cemetery*, 349 U. S. 70, 74. It is for this reason that, the Chamber again submits, the present case warrants the attention of this Court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-359

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

AFL-CIO JOINT NEGOTIATING COMMITTEE FOR PHELPS DODGE, ET AL., AND PHELPS DODGE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

Respondent unions do not deny that the question presented in the Board's petition—*i.e.*, whether a union seeks to compel an employer to engage in bargaining beyond the scope of established bargaining units, in violation of Section 8(b)(3) of the National Labor Relations Act, where, although it engages in separate negotiations for each unit, it refuses to exe-

cute an agreement in one unit until the same general terms are made available to the other units as well —is an important one, which warrants resolution by this Court. They argue solely that the "court below expressly refused to reach or decide that issue, declaring that it was not the basis for the Board's decision and constituted merely a *post hoc* attempt by Board counsel to rationalize a Board decision actually predicated upon a different ground" (Br. in Opp. 6). They contend that the basis of the Board's decision was that "the unions in Western Operations had insisted that the Company bargain with them about non-Western units," and the court below merely "held this finding to be without evidentiary support" (*ibid.*).

The Board's "refusal-to-bargain" finding, however, was not predicated on the theory that the unions insisted to impasse on a companywide master agreement, or on negotiating about the benefits for the other units in the Western Operations bargaining sessions. Rather, the Board's theory was that, while the unions went through the form of bargaining for separate contracts in each unit, their action in insisting upon simultaneous and satisfactory settlement of contracts for all units in order to obtain uniform benefits, had the practical effect of compelling companywide bargaining.

We believe that the specific language of the Board's finding supports this interpretation, and rebuts the contention that the Board concluded there was an effort to conclude a single master agreement, or to

negotiate in one unit about benefits for other units. Thus, the Board found that "one of the [union's] primary objectives throughout the course of bargaining at the [company's] Arizona operations was to obtain agreement on terms and conditions of employment to be applicable generally on a companywide basis, and * * * by insisting in furtherance of the aforesaid objective, as a condition of settlement of negotiations covering the [company's] operations in its Western Division, on simultaneous and satisfactory settlements of contracts in other bargaining units, and by striking in support of such demands, [the unions] have unlawfully attempted to engage in companywide bargaining" (Br. in Op. 5).[1]

Accordingly, contrary to the conclusion of the court below, the question whether the unions violated Section 8(b)(3) of the Act by maintaining, in their separate negotiations, positions which had the practical effect of compelling the Company to bargain beyond established unit lines, is directly presented by the Board's decision here, and is not merely "counsel's *post hoc* rationalizations for agency action" (Pet. in No. 72-220, A-5). Moreover, since the basic

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[1] Footnotes three and seven to that finding further summarize the behavior of the unions which the Board concluded amounted to an attempt to engage in companywide bargaining. Significantly, there is no mention of an attempt to conclude a single master agreement, nor of an attempt to negotiate in one unit about the benefits for other units (Pet. in No. 72-220, A 17-19).

facts are undisputed,[2] and it is important both to the administration of the Act and to the conduct of labor-management relations that this legal issue be promptly resolved (Pet. in No. 72-359, 12-13), this Court should now do so.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

PETER G. NASH,
General Counsel,
National Labor Relations Board.

NOVEMBER 1972.

---

[2] The unions' contention (Br. in Opp. 4, n. 3) that there is a dispute as to whether they "insist[ed] that the terms negotiated in one unit be extended to the other units" rests on the misreading of the Board's decision discussed above. Thus, the unions contended in the court below, and the court below agreed, that the evidence did not support a finding that they insisted upon bargaining about benefits for the other units in the course of the negotiations for the Western Operations. As shown above, however, the Board did not so find, but merely that, while the unions engaged in separate negotiations for each unit, they insisted, as a condition of the settlement of negotiations in one unit, on simultaneous settlement of contracts in other units in order to obtain uniformity in benefits. There is no dispute as to the latter facts; the only issue is whether they justify the Board's legal conclusion that the practical effect of the unions' conduct was the same as if they had overtly compelled the Company to bargain beyond established unit lines.

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